

## **Reconsideration Request Form**

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

*For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.*

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

### **1. Requester Information**

**Name:** Commercial Connect, LLC ("Commercial Connect")

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):**

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

### **2. Request for Reconsideration of (check one only):**

**Board action/inaction**

X **Staff action/inaction**

**3. Description of specific action you are seeking to have reconsidered.**

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

Commercial Connect is seeking reconsideration of the staff's guidance and quality control provided during the String Confusion Objection process during the resolution of two of Commercial Connect's objections. Specifically, Commercial Connect seeks reconsiderations of the guidelines utilized during the String Confusion Process that resulted in ICANN's decision to accept the Panel's determination in 50 504 258 13 ("Decision 258") as an expert determination and advice pursuant to 3.4.6 of the Applicant Guide Book ("AGB") in view of ICANN's decision to accept the Panel's determination in 50 504 261 13 ("Decision 261") which used a completely different interpretation of the guidelines than those used in Decision 258, resulting in inconsistent decisions from the respective Panels. Commercial Connect seeks reconsideration of ICANN's inaction in providing clear and well-defined standard to the Panels, and failure of ICANN to ensure that the Panels comply with the guidelines.

**4. Date of action/inaction:**

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

Decision 258 issued on August 8, 2013.

Decision 261 issued on August 21, 2013.

**5. On what date did you become aware of the action or that action would not be taken?**

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

Commercial Connect learned of the inconsistent application of the guidelines upon the issuance of Decision 261, which addressed the same issue as Decision 258, but resulted in a contrary application of the guidelines. This request for reconsideration is being filed within 15 days of Decision 261. Although Decision 258 issued more than 15 days prior to the filing of this request, the inconsistent

application of the guidelines was not evident to Commercial Connect until the issuance of Decision 261.

**6. Describe how you believe you are materially affected by the action or inaction:**

The staff's failure to provide clear and well-defined guidance to the Panels, and failure to ensure that the Panels comply with the guidelines constitute a material failure of process resulting in inconsistent decisions by Panels applying the identical guidelines with respect to Decisions 258 and 261. As a result, the goal of the AGB in setting up a predictable and consistent process in resolving contention sets is perverted and negatively impacts Commercial Connect's business strategy premised on the consistent application of the AGB to minimize confusion in the domain name environment between domains having similar gTLDs.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

Inconsistent application of the AGB by the Panels will invariably result in confusion in the domain name environment between domains having similar gTLDs. This inconsistency is already evident when the following Panel decisions during String Confusion Objection process are reviewed: .COM/.CAM; .PET/.PETS; .CAR/.CARS; .SPORT/.SPORTS; .HOTEL/.HOTELS.

**8. Detail of Board or Staff Action – Required Information**

**Staff Action:** If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

**Board action:** If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. "Material information" means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being

challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration. Please keep this guidance in mind when submitting requests.

**Provide the Required Detailed Explanation here:**

(You may attach additional sheets as necessary.)

The Reconsideration process can properly be invoked for challenges of the third party's decisions where it can be stated that either the vendor failed to follow its process in reaching that decision, or that the ICANN staff failed to follow its process in accepting that decision. [Recommendation of the Board Governance Committee (BCG) Reconsideration Request 13-5, 1 August 2013.]

Here, in Decision 258 and 261, the respective panels failed to follow the appropriate process in evaluating the merits of the respective Objections by applying the AGB in an entirely inconsistent manner such that they should not have been accepted by the ICANN staff.

AGB 2.2.1.1.3 provides guidance for the dispute resolution process for string similarity:

An application that passes the String Similarity review is still subject to objection by an existing TLD operator or by another gTLD applicant in the current application round. That process requires that a string confusion objection be filed by an objector having the standing to make such an objection. Such category of objection is not limited to visual similarity. Rather, confusion based on any type of similarity (including visual, aural, or similarity of meaning) may be claimed by an objector. Refer to Module 3, Dispute Resolution Procedures, for more information about the objection process.

Decision 258 dealt with Commercial Connect's objection that the IDN for Top Level Domain Holdings Limited (Applicant) consisting of the simplified Chinese characters for "shop", should have been placed in the same contention set as .SHOP. In his decision, the panel stated that:

The only sense in which .SHOP and [IDN] are similar is their meaning. However this similarity in meaning is apparent only to

individuals who read and understand both Chinese and English. Moreover, a person who can read both languages would understand that .SHOP is directed at English-speaking users, while [IDN] is directed at Chinese-speaking users. While there is some potential overlap between the two markets, they are largely distinct. Therefore, there is little likelihood that a bilingual user would be deceived. [Decision 258, p. 7].

Moreover, the panelist for Decision 258 determined that, notwithstanding AGB's express provision allowing confusion to be found on any type of similarity including visual, aural, or similarity of meaning, when an IDN is involved, the guidelines do not permit confusion to be based on meaning alone:

Furthermore as noted above, the New gTLD Program expressly contemplated the creation of new Internationalized Domain Names written in non-Roman scripts. If similarity in meaning between gTLDs written in two different scripts were deemed sufficient, by itself, to result in confusing similarity, then all Internationalized Domain Name applications with the same meaning would need to be put in the same contention set with each other and with any Roman gTLD applications with the same meaning. This would mean that only one application in any script could be registered, which would conflict with the basic purpose of encouraging "a diverse set of applications for new gTLDs, including IDNs creating potential for new uses and benefit to Internet Users across the globe [Decision 258, p. 7.]

However, Decision 261 also addressed the similarity between .SHOP and an IDN filed by Amazon EU S.a r.l. (Applicant). In this case the IDN is the Japanese characters for "online shopping." The panelist here determined that:

Finally, the Applicant has not persuaded the panel that simply using a foreign language or foreign characters in a gTLD string is sufficient basis to differentiate two strings with essentially the same meaning when the string is translated from one language to the other. Many Internet users speak more than one language, including English. The use of essentially the same word in two different languages is sufficient to cause string confusion among the average, reasonable Internet User. [Decision 261, p. 5]

Thus, two different Panels, applying the same guidelines, resulted in inconsistent decisions as to whether a Roman root and a gTLD string of foreign characters having the same meaning should be placed in the same contention set. These inconsistent applications of the guidelines evidences the staff's failure to provide clear and well-defined guidance to the Panels, and failure to ensure that the Panels comply with the guidelines and therefore constitute a material failure of process that must be addressed by the BGC.

## **9. What are you asking ICANN to do now?**

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

Commercial Connect requests that ICANN issue clear and well-defined guidance, for example, properly determined string confusion analyses from the String Similarity Panel and that ICANN ensure that the Panels comply with the guidelines, especially with respect to decisions regarding similarities when gTLDs for IDNs having foreign characters are involved. Once ICANN establishes well-defined guidance, it should return to the respective panels any decisions that do not comply with the guidance. Here, it appears Decision 258 is taking a position that is not consistent with AGB 2.2.1.1.3 and Decision 261 and thus review and return of Decision 261 to the panel would be appropriate.

## **10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

Over the last thirteen years, Commercial Connect has worked diligently with ICANN providing input and feedback in establishing ICANN's New gTLD program. Commercial Connect has invested substantial time, effort, and financial resources, all while complying with ICANN's rules expecting to participate in a process designed to minimize confusion in the domain name environment between domains having similar gTLDs.

Commercial Connect's participation in the String Similarity Objection process was predicated on its reliance upon the appointment of a panelist that would comply with clear and well-defined guidance provided by ICANN with the understanding that ICANN would only accept such Panel decisions that complied with its guidance. ICANN staff's failure to provide and ensure compliance with clear and well defined guidance has resulted in inconsistent results in identical fact patterns. The failure to include similar gTLDs in the same contention set will not meet ICANN's goals of minimizing confusion in the domain name

environment between domains having similar gTLDs and Commercial Connect and the community which it represents will be harmed if gTLDs similar to .SHOP are permitted to coexist.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

Yes

No

**11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.**

**Do you have any documents you want to provide to ICANN?**

Decision 258

Decision 261

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

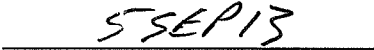
The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration

recommendation is final and not subject to a reconsideration request.



Signature



Date